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Supreme Court, U.S.
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No. 96-470

In The

Supreme Court of the United States

October Term, 1996

SOPHIE STARZENSKI, KAZMER STARZENSKI, and GENNIE STARZENSKI,

Petitioners,

vs.

CITY OF ELKHART, RICHARD L. MOORE, STREET COMMISSIONER, RAYMOND H. MINEGAR, CODE ENFORCEMENT OFFICER AND PRESIDENT, LEROY BERRY, JR., CITY OF ELKHART HEARING OFFICER and HEALTH AND SANITATION COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Circuit Court For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Seventh Circuit correctly upheld the District Court's decision to dismiss Petitioners' federal action because the issue raised in that action had already been decided by a state court in a collateral proceeding.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

The Respondents, City of Elkhart, Richard L. Moore, Street Commissioner, Raymond H. Minegar, Code Enforcement Officer and President, Lee Roy Berry, Jr., City of Elkhart Hearing Officer, and Health and Sanitation Commission (collectively referred to as the "City"), by counsel, respectfully ask the Court to deny the Petition for Writ of *Certiorari* of the Petitioners, Sophie Starzenski, Kazmer Starzenski, and Gennie Starzenski (collectively referred to as the "Petitioners").

COUNTERSTATEMENT OF THE CASE

On February 8, 1993, the City entered onto and cleaned Petitioners' property. On that same day, Petitioners filed a complaint in state court (the "state court case") seeking a temporary restraining order prohibiting the City from continuing the clean-up of their property because the City did not have a judicial warrant. On June 11, 1993, while the state court case was pending, Petitioners filed this case for damages in the United States District Court for the Northern District of Indiana pursuant to 42 U.S.C. § 1983.

The state court case reached its conclusion before the federal case. The state trial court found that, in these circumstances, neither the Indiana Constitution nor the United States Constitution required the City to obtain a judicial warrant before entering Petitioners' property. Petitioners appealed this decision to the Indiana Court of Appeals. The Indiana Court of Appeals affirmed the trial

court's ruling. *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132 (Ind.App. 1996). Petitioners then petitioned the Indiana Supreme Court for transfer. The Indiana Supreme Court denied transfer. *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132, 1132 (Ind.App. 1996). Petitioners have recently petitioned this Court for Writ of *Certiorari* relating to the state court case (Case No. 96-350).

Based on the state trial court's decision, the City filed a motion with the District Court to dismiss the federal case on the basis that *res judicata* barred relitigation of the constitutional issues decided by the state court. Petitioners admitted before the District Court, as they do here, that the state court case would preclude the federal action if the state court case was final. They argued, however, that the federal action should be stayed pending completion of the state appeal process. On February 25, 1995, the District Court dismissed this case. At that time, the state court case was pending before the Indiana Court of Appeals.

Petitioners timely filed their appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the decision of the trial court. *Starzenski v. City of Elkhart, et al.*, 87 F.3d 872 (7th Cir. 1996). On September 23, 1996, Petitioners filed this Petition for Writ of *Certiorari* (the "Petition").

REASONS FOR DENYING PETITION

In this appeal, Petitioners concede that the doctrine of *res judicata* prevents relitigation of their claims in federal court after the state court decided their constitutional claims against them. Petition, page 5. Petitioners contend, however, that the federal district court erred when it refused to stay (rather than dismiss) the federal proceedings until all appeals of the state court case had been exhausted. Petition, page 5. For at least three reasons, this claim has no merit.

I. UNDER APPLICABLE LAW, THE STATE COURT JUDGMENT PRECLUDED ANY ACTION BY THE FEDERAL DISTRICT COURT.

The City's position on this point was clearly and effectively stated by the Seventh Circuit in the decision below.

> Because the preclusive effect of a state judgment in a collateral federal case is governed by state law, *Marrese [v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380-381 (1985)] *Lolling [v. Patterson*, 966 F.2d 230, 235 (7th Cir. 1992); *see also*, 28 U.S.C. § 1738] we must look to Indiana law to determine whether we should give preclusive effect to a case that has reached final judgment in a trial court and which is currently being appealed. *See Rogers v. Desiderio*, 58 F.3d 299, 301-02 (7th Cir. 1995) (applying the principle that state law controls the preclusive effect of a judgment to a situation where a judgment was on appeal within the state system, but granting a stay because Illinois law was not clear on this point).

Indiana law provides that a pending appeal does not undermine the force of a judgment. *Pollard v. Superior Court of Marion County*, 122 N.E.2d 612, 617-18 (Ind. 1954). More specifically, "an appeal from the judgment of the trial court does not have the effect of vacating the judgment of the trial court. . . . [and] [s]uch judgment is in full force and effect until it is reversed, and is binding on the parties as to every question decided." *Jones v. American Family Mutual Ins. Co.*, 489 N.E.2d 160, 166 (Ind.Ct.App. 1986) (quoting *Daugherty v. Daugherty*, 83 N.E.2d 485, 486 (Ind.Ct.App. 1949)). The fact that the plaintiffs appealed the case and now seek transfer to the Indiana Supreme Court, does not undermine the preclusive effect of the Elkhart Superior Court's judgment on issues actually decided. It is true that "a judgment which has been reversed on its merits cannot have any claim precluding effect [in subsequent cases]." *Koors v. Great Southwest Fire Ins. Co.*, 538 N.E.2d 259, 261 (Ind.Ct.App. 1989). However, given the Indiana rule in *Jones and Daugherty* that a judgment has full preclusive effect during the pendency of the appeal, it is clear that the rule stated in *Koors* is limited to those cases that have been previously reversed and has no bearing on cases that have the potential to be reversed. Therefore, Indiana law directs us to give preclusive effect to the judgment of the Elkhart Superior Court notwithstanding the plaintiffs' subsequent appeal and current application for transfer to the Indiana Supreme Court.

Starzenski v. City of Elkhart, et al., 87 F.3d 872, 877-78 (7th Cir. 1996).[1]

II. IF THIS COURT DENIES PETITIONERS' WRIT OF *CERTIORARI* IN CASE NO. 96-350, THIS PETITION IS MOOT.

Under Article III of the United States Constitution, a federal court, including the Supreme Court, may only adjudicate actual ongoing cases or controversies. *Lewis v. Continental Banking Corp.*, 494 U.S. 472, 477 (1990), *Honig v. Doe*, 484 U.S. 305 (1988). This case-or-controversy requirement for federal jurisdiction subsists through all stages of federal proceedings, trial or appellate. *Lewis*, 494 U.S. at 477. To sustain this Court's jurisdiction, it is not enough that the dispute was very much alive when suit was filed or when review was obtained by the Court of Appeals. *Id.* at 477-78. The parties must continue to have a personal stake in the outcome of the lawsuit, even at the Supreme Court level. *Id.* at 478.

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[1] It should also be noted that Petitioners were aware of the possibility that their pursuit of the state court decision might prejudice them in federal court. In its Memorandum and Order of January 10, 1994, the District Court warned Petitioners as follows:

> This court warns the plaintiffs that by seeking an unreserved Indiana court final adjudication of their rights, they may well be electing to forgo their right to relitigate the same issues in a federal district court. *See England*, 375 U.S. [411, 417 (1964)].

Despite this clear and unequivocal warning, Petitioners chose to proceed in state court. *Starzenski v. City of Elkhart, et al.*, 842 F.Supp. 1132, 1140 (1995).

In the instant appeal, Petitioners argue that the District Court erred by not staying the federal action until Petitioners exhausted all their appeals of the state court case. Petition, pages 5-6. Petitioners' argument is based upon the premise that, if they won their appeal of the state court case, then the state trial court's decision would no longer preclude Petitioners' federal claim. Petition, pages 5-6.

As noted above, Petitioners have petitioned this Court for Writ of *Certiorari* not only in this case but in the state court case as well (docketed as Case No. 96-350). If this Court denies Petitioners' Writ in Case 96-350, then Petitioners will have exhausted the appellate process for the state court case. As Petitioners concede, the state court decision would then act as *res judicata* on their federal claim. Therefore, if this Court denies *certiorari* in Case No. 96-350, the instant appeal would not be a "live" case-or-controversy, this matter would be rendered moot, and Article III of the Constitution would prohibit this Court from rendering a decision on it.

III. PETITIONERS ASK THIS COURT TO IGNORE WELL-ESTABLISHED CASE LAW AS WELL AS STATUTORY MANDATE.

Petitioners admonish this Court that it "should, through the invocation of its supervisory powers over federal courts, create a nationwide rule preventing any federal district court from dismissing a federal claim as long as a companion state court decision is still in the appellate process." Petition, page 5. Petitioners advance

only one case to support this broad, sweeping position[2] and that case is not on point.[3]

In fact, all relevant authority supports the Seventh Circuit's position that, under the full faith and credit clause of 28 U.S.C. § 1738, the federal court must turn to Indiana law to determine preclusive effect of its own courts' judgments. *See, e.g., Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373 (1985); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In other words, in suggesting that this Court make a new "nationwide rule" to allow Petitioners claim to continue, Petitioners invite this Court to disregard not only its own case law but also the clear statutory language of 28 U.S.C. § 1738. The City requests that this Court decline this invitation by denying Petitioners' Petition for Writ of *Certiorari*.

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[2] In fact, in Petitioners' terse one and one-half pages of argument cites to only two cases *in toto*. In addition to *Ingersoll* (discussed below), Petitioners rely upon *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), for the general proposition that the decision to stay proceedings is left to the sound discretion of the District Court. Indeed, this general proposition does not even apply here because, unlike *Colorado River*, the state trial court in this case had already rendered a final decision at the time the District Court was faced with the decision to stay or dismiss the proceeding.

[3] *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987) addressed whether a federal case should be stayed during the pendency of a Belgian court proceeding. The Ingersoll court explicitly noted that that situation was different from cases where the alternate forum was that of one of the states of the Union "to which, under our Constitution, we owe a special obligation of comity." *Id.*, at 685.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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